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SUPREME COURT, U. S.

No: 71-874

In the Supreme Court of the United States

OCTOBER TERM, 1971

DANIEL MICHAEL FELTMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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Petitioner was convicted on the basis of his plea of nolo contendere of causing a forged and false security to be transported in interstate commerce, knowing it to have been forged and falsely made, in violation of 18 U.S.C. 2314. He was sentenced to eighteen months' imprisonment. The court of appeals affirmed (see Pet. App. 19-23).

In October 1969, petitioner and his wife, who were traveling under the names Danny and Antoinette

Shantrell, were hitchhiking in the area of Houston, Texas. The couple had been given a ride by a Dr. Shangrin. Dr. Shangrin bought the couple bus tickets for a trip to Denver, Colorado. When the doctor left the car to cash a check to buy the tickets, a blank check was stolen out of the glove compartment. The couple later redeemed the bus tickets for cash. Later, after arriving in Oklahoma City, Antoinette filled out the blank check to the order of Danny Shantrell in the amount of $1,200 and after the check was endorsed by petitioner, it was deposited along with the fifty dollars cash in an Oklahoma City bank. They planned to use the deposit slip received from the bank as a means of establishing credit so as to enable them to obtain an apartment (Tr. 54-55).[1]

On October 29, 1970, petitioner and Antoinette entered pleas of not guilty. On November 18, 1970, the day prior to trial, Antoinette changed her plea to nolo contendere. Petitioner appeared with counsel and, with the court's consent, also withdrew his plea of not guilty and entered a plea of nolo contendere. Petitioner assured the judge that he understood the nature of the charge and the penalty, that the plea of nolo contendere would be treated by the court as if it was a plea of guilty, and that he had received no promises, inducement, mistreatment or coercion to enter the plea. Petitioner affirmed that he had in fact committed the crime with which he was charged (Tr. 12-15).

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[1] "Tr." refers to the transcript of the various proceedings before the district court.

On December 4, 1970, prior to sentencing, petitioner filed a motion to withdraw his plea of nolo contendere. As grounds he claimed that he did not in fact believe that he was guilty and that his plea had been induced by an expectation that he would receive leniency from the court when it imposed sentence. On December 9, 1970, a hearing was held on the motion. Petitioner stated that his expectation of leniency was based on a March 1970 interview with an F.B.I. agent while petitioner was in a Denver jail for a parole violation. Petitioner stated that he had been told by the agent that if he helped them find Antoinette, no charges would be brought against him or, if charges were filed, his cooperation with the authorities would help him (Tr. 25, 30). The court then asked petitioner why he had admitted committing the crime at the time his plea of nolo contendere was entered. Petitioner answered, "* * * actually, I did commit the crime" (Tr. 33-34). When asked why he now thought the court would not be lenient in sentencing, petitioner replied: "Due to my prior record" (Tr. 35). The court then inquired whether petitioner's record was then the same as it had been at the time the plea was entered and petitioner said that it was. The government stated that it would make a full disclosure in the pre-sentence report as to the nature and extent of petitioner's cooperation with the authorities (Tr. 41-42).

In denying the motion for withdrawal of the plea, the judge relied on the fact that petitioner had on two occasions admitted before the court that he had committed the crime charged. The judge also found

that petitioner's plea had been voluntary (Tr. 47-49). Petitioner was then sentenced to eighteen months' imprisonment (Tr. 60-62).[2] The court of appeals affirmed (Pet. App. 19-23).

Petitioner argues that the trial judge erred in denying his motion to withdraw his plea of nolo contendere under Rule 32(d) Fed.R.Crim.P.,[3] relying on several court of appeals cases holding that such motion, when made prior to sentencing, should be "freely granted." But no case suggests that there is an absolute right to withdraw a plea prior to sentencing under Rule 32(d). See, *e.g.*, *United States ex rel. Scott* v. *Mancusi*, 429 F. 2d 104 (C.A. 2), certiorari denied, 402 U.S. 909; *United States* v. *McDaniel*, 425 F. 2d 813 (C.A. 5). As stated in *Everett* v. *United States*, 336 F. 2d 979, 983 (Burger, J.) (C.A. D.C.):

> * * * [O]ur use of the language 'freely allowed' plainly implies the existence of some circumstances in which a defendant is *not* entitled to withdraw a plea of guilty before sentencing, and negates any absolute right to do so. Overwhelming authority holds, as has this Court, that withdrawal of a guilty plea before sentencing is not an absolute right but a decision within the sound discretion of the trial court which will be re-

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[2] The judge noted that petitioner's cooperation had been mentioned in the pre-sentence report but deemed a prison sentence appropriate in light of petitioner's extensive prior criminal record.

[3] Petitioner does not claim that he was the victim of unkept promises made by the government as a part of the plea bargaining process. Compare *Santobello* v. *New York*, No. 70-98, this Term, decided December 20, 1971.

versed by an appellate court only for an abuse of that discretion.

In the instant case there was no abuse of discretion on the part of the trial judge in denying the motion to withdraw the plea in view of the fact that on two occasions petitioner had admitted committing the charged offense and there was no basis for belief that the plea had not been voluntarily made.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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